(2)

No. 06-239

In the Supreme Court of the United States

JOHN HANSL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 2, 2006, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. The Grant of Certiorari in *Lopez v. Gonzales* and *Toledo-Flores v. United States*

On October 3, 2006, following denial of certiorari in the instant case, this Court heard oral arguments in *Lopez v. Gonzales* and *Toledo-Flores v. United States*, Nos. 05-547 and 05-7664 respectively. The question presented in *Toledo-Flores v. United States* was, "Has the Fifth Circuit erred in holding – in opposition to the Second, Third, Sixth, and Ninth Circuits – that a state felony conviction for simple possession of a controlled substance is a 'drug trafficking crime' under 18 U.S.C. §924(c), and hence an 'aggravated felony' under 8 U.S.C. §1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?" The question in *Lopez v. Gonzales* was substantially the same question.

While the instant case involves the statutory interpretation of the Refugee Relief Act of 1953 ("RRA") and how former concentration camp guards were handled under the RRA and the INA in 1955, whereas the *Lopez* and *Toledo-Flores* cases involve how state crime charges affect immigration status, many of the same fundamental considerations are involved regarding the issue of uniformity within immigration law. As pointed out in the *Lopez* brief,

> "Congress's exclusive power 'to establish a uniform Rule of Naturalization' has given rise to a well-settled policy that federal immigration and naturalization laws should be applied uniformly throughout the country.

> Congress itself has endorsed this policy, declaring: 'It is the sense of Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 §115, 100 Stat. 3559, 3384 (1986). . .By its terms, the Constitution grants Congress authority to 'establish a uniform Rule.' U.S. Const. art. I, §8 does not grant Congress authority to establish a nonuniform rule." *Lopez* Brief, 34-35.

Congress had already established a permanent national immigration law, the INA, when it enacted a second post-war refugee emergency visa statute, the RRA, in 1953. The RRA incorporated the INA within RRA §15, and as noted below, its legislative history makes clear that Congress intended that the RRA be administered within the parameters of the INA. Any interpretation of the RRA that would have put it at odds with the INA would have been unconstitutional. This Court has always preferred interpretations that avoid serious constitutional issues. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

As noted by Acting Secretary of State Walter Bedell Smith: "This proposal [the RRA] is not directed toward changing [the Immigration and Nationality Act]. In fact the program it provides for would operate within the framework of the general existing legislation." C.A. App. 752. Acting Secretary of State Smith was also the same official who signed State Department Instruction CA-4674, later codified into regulations, which created the policy which made former Waffen SS who had belonged to organizations known to have committed atrocities eligible for visas, so long as the applicant had not "personally participated therein." C.A. App. 387.

State Department Instruction CA-4674 was issued under the INA. The withheld evidence established beyond doubt that it was the State Department policy from 1954 onward to apply CA-4674 to former concentration camp guards. App. 51a. The evidence further implicated that RRA-era applicants were considered under the same standard. Furthermore, seven consular officials made statements that to that effect. C.A. App. 58, 128, 1159, 1164, 1150, 1104, 1142 (statements made by former consular officials indicated that former concentration camp guards could have been granted visas under the RRA). This uniformity of treatment under immigration law is consistent with the constitutionality of congressional power to enact and regulate immigration law. Any other way of interpreting and applying the RRA would have resulted in non-uniform immigration law and policy, which would have been unconstitutional and invalid.

Consular officials who were responsible to administer both the INA and the RRA could not possibly have been expected to apply different standards to former concentration camp guards under the INA and the RRA, in violation of uniform immigration policy, nor were they expected to do so. "In guidance to RRA visa officers [State Department and Visa Office officials] Mssrs. L'Heureux and Smith noted that CA-4674 removed the rigidity that numbers of consular officials had perceived in Section 212(a)(27), (28), and (29) of the Immigration and Nationality Act and, by extension, Section 14 of the Refugee Relief Act . . . No longer could RRA visa officers automatically find a person ineligible to receive a visa solely because of membership in a proscribed organization." Blake Affidavit. C.A. App. 58.

This issue of uniformity within immigration law matters not only to RRA defendants, but matters because the interpretation of undefined terms within immigration statutes

is involve Where immigration statutes have ambiguous language that is capable of more than one interpretation, circuits are now split on whether to defer to the agency interpretation, or to apply dictionary meanings to the statutory language, and call it unambiguous. This creates uncertainty regarding the degree of discretion the immigration and Homeland Security agencies are to be afforded as they administer immigration laws containing undefined terms. Then writing for the Third Circuit, Justice Alito stated that within the asylum context (which the RRA foreshadowed), the undefined term "persecution" expressed unmistakable congressional intent to delegate interpretive authority: "We infer from Congress's use of this ambiguous term an intent to delegate interpretive authority to the agency, including the ability to decide, within a reasonable range, the contours of its meaning." *Chen v. Ashcroft,* 381 F.3d 221, 232 (3d Cir. 2004). Justice Alito further explained the rationale for bright-line agency rules: "Such rules, like the one adopted by the BIA here, represent pragmatic approaches that make it possible for an overburdened agency to do the work with which it is charged." *Id.* at 229.

The facts in *Chen* related to persecution in China relating to enforced birth control. However, Justice Alito alluded to the Holtzman Amendment legislative history when he explained why Congress refrained from defining "persecution:" "At a more general level, we note that some members of Congress have in the past actually considered--and rejected--the possibility of providing an explicit definition for "persecution" in connection with another portion of the INA. It was reasoned that: 'Persecution, however, has and will continue to take many forms and it is the intention of the committee in recommending this legislation to allow the maximum amount of flexibility possible in its administration. The inclusion of a necessarily limited and rigid definition

would be inconsistent with such an intent.'" *Id.* at 234 (citing the Holtzman Amendment legislative history, H.R. Rep. 95-1452, at 6-7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4705-06). This logic is also consonant with that of Senator Watkins, when discussing the difficulty of assessing persecution prior to the passage of the RRA, in a discussion that included the example of a refugee whose past history included service at three concentration camps. Also involved in the discussion was an expert on refugee screening, Dr. Roland Elliott, who had been involved in volunteer agency screening under the DPA:

> Senator Welker: How are we going to get over there and investigate where these refugees came from, their backgrounds, as to what they did, whether or not they were subversive, whether or not they took part in persecution behind the Iron Curtain? It seems to me that is one of our hardest problems. Would you agree with me, Doctor, on that?. . .
> Dr. Elliott: It is a very difficult problem, I certainly would say. My own feeling is that we need competent people to do the screening far more than we need precise definitions with regard to, well such things as criminality. What is criminality? It may be that the criminality that would be interpreted as being exclusionary would be the kind of criminality that would be part of a person's necessity to survive or escape. For example, we have a case [page cut off] Island being detained under the requirement of the DP law, where a man, because of early experience in Rumania, is excludable. But following that experience, he served in three Nazi concentration camps in Germany. So that what I am saying is that we need a certain amount of resiliency and personal judgment in this area as well as strict definitions.

> Senator Watkins: Well, it is almost impossible in dealing with human beings to adopt strict, rigid rules that will apply to every case, and render justice in each case. C.A. App. 781.2.

This congressional dialogue provides plausible rationale as to why the crucial exclusionary terms in RRA §14(a) were left undefined, leaving the precise contours to be defined by the State Department personnel responsible for its administration. How the State Department resolved the question of applying workable parameters was answered by the withheld evidence. That evidence tended to indicate that where former concentration camp guards were concerned, the State Department applied the concrete and measurable "bright-line agency rule," "personally participated in atrocities," in its administration of the ambiguous §14(a) clause, "personally advocated or assisted in persecution." App. 51a (example of how CA-4674 was applied to RRA-era former concentration camp guards, since mere membership was prohibited as a way to screen for visa eligibility). This reasonable way to apply uniform immigration policy across two statutes, the INA and the RRA, must be upheld when Congress left the crucial terms of the RRA undefined, thereby leaving it to the State Department to define the contours of the policy.

The Third Circuit's interpretation in *Chen* is sharply at odds with the interpretation of the Eighth Circuit, however, which when faced with the similarly undefined terms within the RRA, held: "We need not turn to either the immigration officials' testimony or legislative history to determine the meaning of 'personally assisted' because the language of section 14(a) of the RRA is unambiguous . . .' The plain meaning of a statute controls, if there is one, regardless of an agency's interpretation.'" App. 8a (*citing United States v.*

S.A., 129 F.3d 995, 998 (8th Cir. 1997); *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996)). Justice Alito's interpretation is consistent with the body of law which has held that within immigration law, it is well established that this Court gives deference to executive agency interpretations. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Conversely, the Eighth Circuit relied on cases unrelated to immigration law to support its proposition that the agency's view need not be consulted when interpreting the law in that area.

The close identity of the fundamental issue regarding uniformity of application of immigration laws in this petition and the *Lopez* and *Toledo-Florez* granted petitions amply justifies reconsideration of the denial of certiorari here. This Court should clarify for public policy reasons that within immigration law, this Court gives deference to congressionally-delegated, reasonable agency interpretations of undefined, ambiguous statutory terms that are consistent with the intent of the statute, and that result in uniform immigration policy. Such clarification would be consistent with this Court's rationale in *Fedorenko v. United States*, as well.

2. The War On Terror Means There Will Likely Be An Increase In Cases Affecting Naturalized Citizens

The tenor of the times indicates a coming rise in the number of U.S. citizens affected by the War on Terror, and therefore it is highly likely that there will also be an increase in cases affecting naturalized citizens. *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (habeas case affecting U.S. citizen designated an "enemy combatant" under Homeland Security laws). A serious concern for future cases is the burden of proof that the Government should be expected to

carry in denaturalizing a citizen. This Court should take this opportunity to clarify and provide guidance on this important point.

In the instant case, the defendant brought ample evidence tending to show that it was the practice of the agency at the time to grant visas to former concentration camp guards under both the INA and RRA, under certain conditions. The evidence withheld by the Government and belatedly produced during appellate proceedings validated the evidence and lower court arguments of the defendant. For its part, the Government simply brought evidence to show that the defendant had been a guard, which was never disputed, and brought evidence relating to the horrific medical experiments and other atrocities committed by the Nazis, thereby implicating the defendant by association, although never charging that the defendant had been involved in any of those atrocities. The burden of proof for summary judgment therefore cannot be said to have been fulfilled, regarding whether the defendant had "personally assisted" in persecution within the meaning of Congress and the policy of the State Department during 1955. Rather, the statute's meaning was assigned by the court, which failed to fully consider the defendant's evidence. App. 11a (court's order does not mention any consular testimony or State Department Instruction CA-4674, and simply refers to files of known admitted guards as *ultra vires* acts). Ultimately, the withheld evidence indicated that the standard applied by the State Department in 1954 was whether a former concentration camp guard had "personally participated" in atrocities before being ineligible for a visa. App. 51a (State Department advisory opinion cited as applying the standard of CA-4674 to a former concentration camp guard during 1954).

This Court has recognized that the burden of proof in denaturalization proceedings is largely identical to the proof beyond a reasonable doubt standard required in criminal proceedings. *See Klapprott v. United States*, 335 U.S. 601, 612 (1949) ("Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. This burden is substantially identical with that required in criminal cases – proof beyond a reasonable doubt.").

As recently quoted, Judge Posner of the Seventh Circuit has said: "The only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses." *Gonzales-Gomez v. Achim*, 441 F.3d 532,535 (7th Cir. 2006). The instant case presents a similar concern regarding the burden of proof as it affects denaturalization of former concentration camp guards under the RRA. If courts are willing to disregard exculpatory evidence, and uphold the grant of summary judgment to the Government in denaturalization proceedings where the Government not only brought no evidence to show that the defendant had actually met the standards of exclusion as they were in place at the time the visa was granted, but actually withheld exculpatory evidence to the contrary, we must then say that in denaturalization proceedings, "The naturalized citizen always loses."

Future denaturalization cases under anti-terrorism statutes and other legislation must be held to the standards of proper burden of proof that had always been in place before a naturalized citizen could be stripped of the most precious of rights and ejected from society. Where no fraud or misrepresentation existed, and where the policies in place at

the time the visa was granted allowed for the grant of the visa, the visa must be upheld as a legitimate act of the agency acting on behalf of Congress. Subsequent changes in political climate must never be allowed to undermine the judiciary's responsibility to uphold the law.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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October 25, 2006

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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